

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
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March 10, 2005

Dennis C. Whetzal,
Chapter 7 Trustee
Post Office Box 8285
Rapid City, South Dakota 57709

Mr. Kevin Symanowski
1206 18th Street Northwest
Reeder, North Dakota 58649

Subject: *In re Sturgis Meat Service, Inc.*,
Chapter 7, Bankr. No. 02-50012

Dear Trustee Whetzal and Mr. Symanowski:

The matter before the Court is Trustee Dennis C. Whetzal's Final Report and Proposed Distribution and Applications for Compensation and the letter-objection to the Proposed Distribution filed by Kevin Symanowski. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As set forth below, Mr. Symanowski's amended proof of claim will be recognized.

Summary. The deadline to file a proof of claim in this Chapter 7 case was October 21, 2002. Creditor Kevin Symanowski timely filed a proof of claim on October 21, 2002. He stated he and his wife Lynette were owed \$13,100 for some cattle they delivered for which Debtor did not pay them and \$10,000 on a "service contract" investment.

Trustee Dennis C. Whetzal filed his Final Report and Proposed Distribution on December 21, 2004. From assets of the estate, he proposed a small distribution to general unsecured creditors, which were listed in the Report.

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On January 10, 2005, Kevin Symanowski advised the Court by letter that his original proof of claim erroneously stated that his claim was secured rather than unsecured. He stated that he uncovered his error when he noted that Trustee Whetzal had not included his claim among the unsecured claims that were to be paid in part. The Court docketed Mr. Symanowski's letter as both an amended proof of claim and an objection to Trustee Whetzal's Proposed Distribution.¹

A telephonic hearing on the Proposed Distribution was held February 23, 2005. Trustee Whetzal advised the Court that he had no objection to allowing Mr. Symanowski's amended claim to be paid as an unsecured claim. The Court took the matter under advisement.

Discussion. The Court has reviewed the applicable case law regarding amendments to timely filed proofs of claim and is satisfied that Mr. Symanowski's amended proof of claim should be recognized.

The decision to allow an amendment to a claim is within the sound discretion of the bankruptcy court. *In re Wrenn Ins. Agency*, 178 B.R. 792, 798 (Bankr. W.D. Mo. 1995); *In re Fischer*, 109 B.R. 384, 387 (Bankr. E.D. Mo. 1989), *aff'd* 131 B.R. 137 (E.D. Mo. 1990). Once the initial observance of the time limitations for filing a proof of claim is preserved, the courts should be liberal in allowing creditors to amend their proofs of claim, and such amendments may be made at any stage of the proceedings as required by the bankruptcy court's equitable mandate. *In re Donovan Wire & Iron Co.*, 822 F.2d 38, 39-40 (8th Cir. 1987); *Jensen v. Uhlenhopp (In re Uhlenhopp)*, 508 F.2d 412, 414 (8th Cir. 1975); *In re Faulkner*, 161 F. 900, 903 (8th Cir. 1908). As long as the original proof of claim is timely filed, and discloses facts "showing an assertion of a claim against the estate and an intention by the claimant to share in its assets," a basis exists for the court to allow a proposed amendment. *Tarbell v. Crex Carpet Co.*, 90 F.2d 683,

¹ A group known as the "Service Contract Investors" also objected to Trustee Whetzal's Proposed Distribution. That objection was withdrawn at the February 23, 2005, hearing.

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685-86 (8th Cir. 1937). Thus, amendments are generally allowed when "the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim." *Fischer*, 109 B.R. at 387 (quoting *United States v. International Horizons, Inc. (In re International Horizons, Inc.)*, 751 F.2d 1213, 1216 (11th Cir. 1985)).

In re Farmland Industries, 305 B.R. 497, 504 (Bankr. W.D. Mo. 2004); see also *F.D.I.C. v. Union Entities (In re BE-Mac Transport Co.)*, 83 F.3d 1020, 1026-27 (8th Cir. 1996); and *Maynard Savings Bank v. Michels (In re Michels)*, 286 B.R. 684, 691-92 (B.A.P. 8th Cir. 2002)(amendment to informal proof of claim made after deadline recognized).

One aspect of Mr. Symanowski's claim may still need further investigation, however. The original claim indicated it was composed of two parts: \$13,100 for cattle that were delivered but not paid for and \$10,000 on a service contract. Trustee Whetzal and Mr. Symanowski will need to confer on whether the total claim is \$13,100 with \$3,100 owed for cattle and \$10,000 owed on a service contract or whether the total claim is \$23,100 with \$13,100 owed for unpaid cattle and \$10,000 owed for a service contract. Mr. Symanowski and his wife should then file a second amended proof of claim that clearly sets forth their correct claim.

At the hearing, Trustee Whetzal advised the Court that he needed to revise his Final Report and Proposed Distribution because some accountant's fees were erroneously excluded. Since that change needs to be made and also since a second amended proof of claim by the Symanowskis may be filed, the Court asks Trustee Whetzal to withdraw his December 21, 2004, Final Report and Proposed Distribution and then file and notice a revised one.

By separate letter, the Court will also be requesting some additional information regarding the tax refund and Trustee Whetzal's proposed distribution of those funds. Trustee Whetzal may want to delay filing his revised final report and proposed distribution until the Court's concerns about the tax refund are resolved.

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An order sustaining Mr. Symanowski's letter objection to Trustee Whetzal's December 21, 2004, Final Report and Proposed Distribution will be entered.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve parties in interest)